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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/593,550	03/08/2007	Hisae Kume	SPO.129	4478
23557 7590 12/27/2010 SALIWANCHIK LLOYD & SALIWANCHIK A PROFESSIONAL ASSOCIATION PO Box 142950 GAINESVILLE, FL 32614				
EXAMINER DUBOIS, PHILIP A				
ART UNIT 1781		PAPER NUMBER		
NOTIFICATION DATE 12/27/2010		DELIVERY MODE ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

euspto@slspatents.com

Office Action Summary

Application No.

10/593,550

Applicant(s)

KUME ET AL.

Examiner

PHILIP DUBOIS

Art Unit

1781

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 30 November 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-11 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-912)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date 11/30/2010
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

This is in response to the Request for Continued Examination and Amendment filed on November 30, 2010. Claims 1-11 are pending in the application. Any rejections from the previous Official Action not reiterated below have been withdrawn.

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1-6 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
3. Claim 1 recites that a composition is prepared "using" a fermented dairy product. It is unclear what method/process applicant is intending to encompass and how these method/process steps may effects the antibacterial composition. Claims 2-6 rely on claim 1 as an independent claim.

Claim Rejections - 35 USC § 103

4. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

1. Claims 1-6 stand rejected under 35 U.S.C. 103(a) as being unpatentable over IZVEKOVA. The rejection of claims 7-11 over IZVEKOVA has been withdrawn.
2. IZVEKOVA is cited for the reasons noted in the previous Official Action.
3. Claims 1-5 are rejected under 35 U.S.C. 103(a) as being unpatentable over JING, China Health Monthly, 2003, 8, 102-3 (english translation).
4. JING discloses an antibacterial composition, wherein the composition comprises carbohydrates, proteins, and fats, and c) has a pH of 4.6 or less. The carbohydrates, proteins, and fats are obtained from fermented milk. In the example on page 2 of the translation, the energy ratio of protein, fat, and carbohydrate is 14.3%, 33.75%, and 51%, respectively. However, JING teaches that the yoghurt can be made with low-fat, skim milk or regular milk. In this regard, it would have been expected by one skilled in the art that the energy ratio could vary based on the type of milk that is used (page 1 of translation, lines 15-22).
5. JING also teaches that vitamins, minerals and dietary fibers can be present in the yoghurt (see table on page 2 of translation).
6. JING teaches that the yoghurt is prepared so that the lactic acid increases and the pH reaches at least 4.6. Thus, the yoghurt has a pH of at least 4.6 and would naturally contain 300mg or more of lactic acid (page 1 of translation, lines 15-22).
7. JING teaches at the bottom of page 2 of the translation that yoghurt is an antibacterial composition.

8. Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over JING as applied to claims 1-5 above, and further in view of IZVEKOVA.

JING is cited for the reasons noted above. However, JING is silent as to providing yoghurt with honey, dextrin, pectin, mixed oils and fats, and soybean lecithin. However, IZVEKOVA teaches that these ingredients can be used to obtain improved yoghurt (col. 4, lines 23-68). In this regard, it would have been obvious to one skilled in the art to add these ingredients to the yoghurt of JING to obtain improved yoghurt. It would have been obvious to vary the amount of ingredients in the yoghurt based on the properties such as a taste and nutritional value that are desired in the final product.

9. Claims 7-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over JING as applied to claims 1-5 above, and further in view of United States Patent No. 3,932,680 (EGLI).

10. JING is cited for the reasons noted above. However, JING is silent as to homogenizing and sterilizing a yogurt mixture. However, EGLI teaches the production of sterile yoghurt (abstract). In particular, EGLI teaches that it is desirable to sterilize and homogenize yoghurt because sterile yoghurt is free of bacteria and germs and that can be stored up to six months. Thus, it would have been obvious to sterilize and homogenize the yoghurt of JING to obtain yoghurt free of bacteria and germs and with improved shelf life properties.

Response to Arguments

Claims 1-6

11. Applicant's arguments filed November 20, 2010 have been fully considered but they are not persuasive in regards to the rejection of claims 1-6.

12. It is respectfully noted that IZVEKOVA teaches an energy ratio range that overlaps the same energy ratio as claimed (col. 5, lines 20-30). In this regard, the arguments that IZVEKOVA does not teach or suggest the claimed energy ratio are not persuasive.

13. The declaration has been considered but does not tip the scales towards a conclusion of nonobviousness. As noted above, JING evidences that yoghurt is expected to exhibit antibacterial properties. In this regard, the applicant is most respectfully reminded that any differences between the claimed invention and the prior art may be expected to result in some differences in properties. The issue is whether the properties differ to such an extent that the difference is really unexpected. *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986) (differences in sedative and anticholinergic effects between prior art and claimed antidepressants were not unexpected). In *In re Wymouth*, 499 F.2d 1273, 1276, 182 USPQ 290, 293 (CCPA 1974), the court held that unexpected results for a claimed range as compared with the range disclosed in the prior art had been shown by a demonstration of "a marked improvement, over the results achieved under other ratios, as to be classified as a difference in kind, rather than one of degree."

14. It is also most respectfully noted that the Declaration by Dr. Kume (Declaration) does not directly compare the composition of claim 1 (i.e., the broadest claim) within IZVEKOVA. The composition produced in accordance with the claimed invention

according to the Declaration can be found on page 3 of the Declaration (see Table1). Table 1 indicates that the composition includes not just carbohydrates, proteins and fats, but also contains honey, dextrin, pectin, and other ingredients. Furthermore, the Declaration only compares the composition of Table 1 to compositions that have ranges similar in scope to those set forth in IZVEKOVA (e.g., see Table 2). Thus, a comparison between the invention as set forth in the broadest claims and IZVEKOVA has not been made.

15. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., suppressive effects against particular types of bacteria) are not recited in the rejected claim(s). See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

16. Thus, the evidence set forth in the declaration is not persuasive for the reasons noted above.

Claims 7-11

17. Applicant's arguments with respect to claims 7-11 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to PHILIP DUBOIS whose telephone number is (571) 272-6107. The examiner can normally be reached on Monday-Friday from 9:30am-7:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/PHILIP DUBOIS/
Examiner, Art Unit 1781

/Lien T Tran/
Primary Examiner, Art Unit 1789